

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rules Concerning Certification of the	:	
Electric Reliability Organization; and	:	
Procedures for the Establishment,	:	Docket No. RM05-30-000
Approval and Enforcement of Electric	:	
Reliability Standards	:	

SECOND TECHNICAL CONFERENCE

COMMENTS OF SONNY POPOWSKY
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ON BEHALF OF THE NATIONAL ASSOCIATION OF
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Introduction

My name is Sonny Popowsky. I have served as the Consumer Advocate of Pennsylvania since 1990 and I have worked at the Office of Consumer Advocate since 1979. I am speaking here today on behalf of my Office and the National Association of State Utility Consumer Advocates (NASUCA). NASUCA is an association representing 44 state utility consumer advocate offices in 41 states and the District of Columbia. Each of these offices is authorized by the laws of their respective jurisdictions to represent the interests of utility consumers in matters before state and federal regulators and courts. I formerly served as President of NASUCA and as the Chairman of NASUCA's Electricity Committee. Most relevant for the purpose of today's hearing, I served as the first representative of small consumers on the Board of the North American Electric Reliability Council ("NERC"). I held that position from 1996 to 2001 when NERC switched to an Independent Board structure. Since that time, I have served as one of two representatives of small consumers on the NERC Stakeholder Committee. Other NASUCA members have served on all of NERC's major committees and several important working groups and task forces, including the working group that helped to formulate the legislative proposal that ultimately became the reliability section of the Energy Policy Act of 2005.¹

NASUCA was a strong proponent of the reliability legislation that brought about the changes that are being addressed here today. In June 1998, a full seven years before passage of the Energy Policy Act of 2005 ("the Act"), NASUCA adopted a resolution

¹ In addition to the Pennsylvania Office of Consumer Advocate, the NASUCA offices that have participated in the NERC Committees and Registered Ballot Body include the Arizona Residential Utility Consumer Office, the Maine Office of the Public Advocate, the Maryland Office of People's Counsel, and the Missouri Office of the Public Counsel.

endorsing the establishment of a national reliability organization and clarification of the Commission's authority to oversee the imposition of mandatory reliability standards.

NASUCA resolved in 1998 that:

NASUCA supports efforts to establish an Independent Board of directors that will govern NERC (or any successor national organization) in a competitively neutral manner that will benefit all consumers and that will not be dominated or controlled by any particular industry segment.

And NASUCA further resolved that:

NASUCA supports federal legislation that would clarify FERC authority to review the reliability requirements imposed by NERC (or any successor national organization) and to ensure that such requirements are adopted and implemented in a manner that benefits all consumers.

Since the passage of that resolution in 1998, NASUCA worked alongside the NERC Board and other industry organizations to support the passage of the reliability provisions that were finally enacted as part of the Energy Policy Act of 2005. NASUCA also filed Comments with this Commission on October 7, 2005, regarding the proposed regulations that the Commission must promulgate in order to implement the reliability provisions of the Energy Policy Act. In those Comments, NASUCA emphasized the extraordinary importance of this issue to electricity consumers and the vital need for those consumers to be represented in every phase of the reliability process at both the national and regional levels. As noted in those Comments:

NASUCA wishes to underscore that it is the consumers represented by its members who bear the cost of maintaining a reliable electric system, but who also bear the primary share of the costs when reliability fails, as it did in August, 2003, when a blackout affected significant portions of the Northeast and Midwest United States.

Those Comments further noted that:

NASUCA's focus is driven by the fact that the costs of the ERO [Electric Reliability Organization] and its subsidiary regional organizations, as well as the costs of implementing the reliability standards that the ERO establishes, will ultimately be borne by the consumers that NAUSCA members represent.

It was in light of these comments that NASUCA urged this Commission to ensure that consumers must be represented on the stakeholder committee and/or stakeholder boards of both the Electric Reliability Organization and on any Regional Reliability Organizations established under the Act. Indeed, NASUCA contended that the requirements of Section 215(c)(2)(A) of the Act for "fair stakeholder representation in the selection of its directors and balanced decisionmaking in any Electric Reliability Organization or subordinate organizational structure" could not possibly be met by any structure that did not include full representation of the consumers who pay the bills.

While the focus of today's panel is on the role of states generally in the reliability process, I would like to reiterate within that general framework the specific important role of state consumer representatives in every relevant phase of the process. In that light, I would answer the specific questions posed to the members of this panel as follows:

What role should states and provinces play with regard to reliability standards?

Notwithstanding the traditional role of NERC and the new role of FERC with respect to the establishment of reliability standards for the operation of the Nation's bulk power system, there is no doubt that consumers will continue to look to their state public

utility commissions and state governments for the purpose of ensuring safe, reliable and adequate electric service.

As a practical matter, while widespread system outages such as the August 2003 Blackout are thankfully not a common occurrence, it is extremely common for consumers to see their lights go out because of local distribution failures. Those problems may arise due to weather conditions, contact with sensitive equipment by animals, accidents, or aging or poorly maintained distribution equipment. In any case, these problems are not addressed and cannot be addressed by this Commission or by the new ERO. When the lights go out, customers call their local utility, their state PUC, and their local and state governmental and public emergency officials. They don't often call FERC in Washington and they certainly don't call the NERC offices in Princeton. The basic reliability of the distribution system remains a state function.

Similarly, at the other end of the electric system, the adequacy of electric generation remains a state function. That is, the determination of whether a utility has adequate generation resources is an issue for the states and is specifically excluded from this Commission's authority under the "savings" clause of Section 215(i) of the Energy Policy Act. While some states may choose to rely on regulation to ensure generation adequacy, and other states may choose to rely on market forces, that is a choice to be made by the states, not by this Commission or by an ERO.

The states also retain substantial authority over transmission issues in light of the above-noted savings clause, which states that "nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and

reliability of electric service within that State.” The only exception to that rule is where a state action is “inconsistent” with a reliability standard.²

Many states continue to regulate transmission service as a traditional portion of bundled electric service. Even in “unbundled” states like Pennsylvania, where the setting of transmission rates has been effectively transferred to FERC jurisdiction, the safety and reliability of transmission service remains subject to state PUC jurisdiction. Thus, Pennsylvania’s landmark electric restructuring law of 1996 includes the following declarations of policy:

[I]t is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution service is available at levels and reliability that are currently enjoyed by the citizens and businesses of this Commonwealth. 66 Pa.C.S. §2802(3).

Reliable electric service is of the utmost importance to the health, safety and welfare of the citizens of the Commonwealth. Electric industry restructuring should ensure the reliability of the interconnected electric system by maintaining the efficiency of the transmission and distribution system. 66 Pa.C.S. §2802(12).

Since continuing and ensuring the reliability of electric service depends on adequate generation and on conscientious inspection and maintenance of transmission and distribution systems, the independent system operator or its functional equivalent should set, and the [Pennsylvania Public Utility] commission shall set through regulations, inspection, maintenance, repair, and replacement standards and enforce those standards. 66 Pa.C.S. §2802(20).

² There is even an exception to this exception for the State of New York, which I do not intend to address here.

Thus, even in a restructured state such as Pennsylvania, it can be seen that the state General Assembly believed that the state PUC would continue to exercise its authority to maintain the reliability of all facets of electricity service.

The Pennsylvania PUC has used that authority to issue orders and promulgate regulations regarding the reliability to retail customers of transmission and distribution service. The Pennsylvania PUC regulations utilize the reliability indices of SAIFI (System Average Interruption Frequency Index), CAIDI (Customer Average Interruption Duration Index) and SAIDI (System Average Interruption Duration Index) to monitor each utility's overall reliability performance. The PUC has established specific standards for each index that the utility must achieve on both a 12-month basis and a 36-month basis. These standards reflect the reliability of both the transmission and distribution system used to serve customers since the indices reflect all outages, regardless of cause. The Pennsylvania PUC has also initiated a rulemaking to establish inspection and maintenance standards for key transmission and distribution facilities to better ensure reliable service in the Commonwealth.

Pennsylvania is not alone in the development and use of these types of reliability indices. Numerous states have adopted these metrics as a way of evaluating reliability of service to retail customers.

With that background, and in light of the strongly expressed savings clause in the electric reliability legislation, I would submit that this Commission should tread lightly before pre-empting any actions taken by the states to ensure reliability within their boundaries. A state action should be deemed "inconsistent" with an ERO reliability standard only if the two standards are mutually irreconcilable; that is, where following

one standard would place a party in violation of the other standard. In such a case, the ERO standard would prevail.

In most cases, this should not be difficult to ascertain. For example, a state may have standards regarding the frequency and length of retail customer outages or it may have standards regarding minimum reserve requirements for generation adequacy – but there is no reason to think that those standards would be in any way “inconsistent” with ERO standards regarding the operation of the bulk power system.

On the other hand, it was clear before the Energy Policy Act and it is clearer now, that the operation and control of the interstate bulk power grid must not be regulated inconsistently on a state by state basis. This has long been recognized in Pennsylvania, which has had at least some of its utilities operate as part of the PJM Interconnection since PJM was founded in 1927. To my knowledge, the division of responsibilities among the PJM states and the PJM Interconnection (and the corresponding MAAC regional reliability council) has not been a major source of friction.

In the future, I would anticipate that states would continue to play a primary role with regard to distribution and generation reliability and even for transmission issues related to matters such as power line maintenance and the effect of transmission system outages on overall reliability for retail consumers.

With respect to ERO reliability standards for the actual operation and control of the interstate bulk power grid, however, states will be participants in the standards process, but the standards themselves must be the province of the ERO and the FERC. Except perhaps in the case of the State of New York, I do not envision state PUC’s or other state authorities promulgating reliability standards that attempt to tell interstate

system operators how to operate the bulk power system. On the other hand, given the importance of these standards to every state, I do anticipate that state commissions and state consumer advocates will be actively involved at the regional and national levels in participating in the development of those standards.

How should the Commission receive input for approval of reliability standards from the states, provinces, Regional Entities and ERO?

State government input will be most effective if, as discussed above, the states have a full participatory role in the development of reliability standards. The same is true for state consumer advocates who represent interests that are distinct and often different from the broader interests of the states themselves.

Given the enormous impact that a reliability failure can have on states and on consumers, NASUCA respectfully submits that any concerns raised by states and consumer representatives should be accorded great weight by this Commission. Participation of the states and state consumer advocates should be permitted and encouraged at each stage of the stakeholder and comment process. This Commission must not wait until the actual approval stage to ensure that the voices of states and consumers are heard. Having said that, the states and state consumer advocates must retain the right to support, oppose, or urge modifications to any reliability standard that comes to this Commission for final approval.

What test should the Commission use to determine whether a state-developed rule conflicts with reliability standards?

As noted above and as set forth in the Act, the Commission should only preempt a state developed rule if it is “inconsistent” with a reliability standard. A state action should only be deemed inconsistent with an ERO reliability standard if the two standards are mutually irreconcilable; that is, where following one standard would place a party in violation of the other standard. In those cases, and only those cases, the state standard will be preempted.³

As I also noted above, based at least on my experience with Pennsylvania and PJM, this line has not been that difficult to draw, as the traditional reliability-related roles of state regulators and the regional interconnection have been fairly distinct.

When should Regional Advisory Bodies be convened and for what purpose?

The establishment of regional advisory bodies should be a matter that is left to the discretion of the states. Particularly in the Eastern Interconnection, I would expect that the makeup of any regional body might vary over time and that some states might find themselves in more than one “region” at any given point in time. State commissions already have formed voluntary advisory groups within both the PJM and MISO regions and some commissions are members of both organizations. In the Western Interconnection – which has long operated as a single unified region -- it is my understanding that interconnection-wide state participation already has been established and might readily evolve into the creation of a regional advisory board.

³ Again, in the case of New York State, a different rule would apply.

It is not clear to me what particular issues will require the creation of new regional advisory bodies. That is, I am not sure where the states will find it necessary to create a separate body to provide input to the ERO, a Regional Entity, or to FERC, that is over and above the input that each state would already be providing through the stakeholder and comment process of which they should be a vital part. Again, I expect that the issues will vary by Interconnection and by Region.

What role should the states, provinces, Regional Entities, ERO, and the Commission play in determining resource adequacy?

Here, I believe, the Energy Policy Act is again clear that Section 215 “does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.” Section 215(i)(2). The power to establish resource adequacy standards therefore remains with the states.

It should be noted, however, that even prior to restructuring, some states like Pennsylvania had essentially deferred to regional interconnections like PJM to “do the math” in developing resource adequacy standards. Thus, PJM (through the MAAC reliability council) has long maintained a one day in ten year loss of load probability standard for generation adequacy and it has been PJM that has traditionally converted that standard into a percentage reserve requirement that must be met by each PJM utility (or now, by each load serving entity). Under traditional regulation, the Pennsylvania Public Utility Commission would then look to the PJM reserve requirement for various regulatory purposes.

A more difficult issue has now arisen in PJM and other regions in which some or all of the states have opened their generation markets to competition. Specifically, those regions have proposed new mechanisms for compensating generators for providing capacity into the market. Those proposals – such as the RPM proposal in PJM, and the LICAP proposal in New England – have been extremely controversial and are now pending in some form or other before this Commission. Suffice it to say for purposes of this discussion that Section 215 of the Energy Policy Act does not address this pricing issue and does not affect the underlying jurisdiction of the states or FERC with respect to questions of generation adequacy.

In my view, the states continue to have the responsibility for ensuring the adequacy of electric generation in their respective states. That is not to say that states cannot or should not work together on a regional basis in order to ensure generation adequacy. There are benefits to reserve sharing, joint ownership, and diversity agreements among utilities, and the ability to obtain those benefits often requires coordination among states. By working together, states can better avoid both shortages and excess capacity, and can reduce exposure to energy price spikes.

At the other end of the spectrum, a state may decide to deregulate its generation service entirely and to rely solely on competitive market forces both for purposes of setting the price of generation and for ensuring generation resource adequacy.

In any case, to the extent a state wishes to leave generation adequacy to market forces or wishes to defer to the judgment of a regional organization such as an RTO or ISO or RRO, that is a matter that is wholly within that state's discretion. The Energy Policy Act does nothing to remove that authority from the states.

Conclusion

The reliability of electricity service is vital to every consumer. As representatives of our respective states' electricity consumers, NASUCA members thank the Commission for this opportunity to express our views on this topic. We look forward to working with this Commission, as well as the future Electric Reliability Organization and Regional Reliability Organizations to develop regulations and institutions that will maximize reliability at a reasonable cost to all consumers.

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